

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 02 August 2005**

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In the Matter of:

EVERETT PENNINGTON  
Claimant

Case No.: 2004 BLA 6199

v.

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS  
Party in Interest

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Appearances: Mr. Edmond Collett, Attorney  
For Claimant

Ms. Theresa Ball, Attorney  
For Director

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**DECISION AND ORDER – AWARD OF BENEFITS**

This matter involves a claim filed by Mr. Everett Pennington for disability benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 (“the Act”). Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as “black lung” disease.

**Procedural Background**

**First Claim**

Mr. Pennington filed his first application for black lung disability benefits on July 2, 1991. The District Director subsequently informed Mr. Pennington that the medical evidence did not show that he was totally disabled from a respiratory standpoint. Mr. Pennington timely appealed and requested a hearing and the case was referred to the Office of Administrative Law Judges (“OALJ”). Administrative Law Judge Robert Glennon conducted a hearing on December 8, 1992 and issued a decision denying benefits to Mr. Pennington on August 24, 1993, finding that Mr. Pennington established the presence of pneumoconiosis based on radiographic evidence and medical opinion but did not establish that he was totally disabled. Mr. Pennington appealed

the denial decision to the Benefits Review Board (“BRB” or “Board”). Meanwhile, the named Responsible Operator, Blue Diamond Coal Company, filed bankruptcy. As a result, the BRB issued an Order on May 27, 1994, dismissing the Employer as a party to the appeal, with the case proceeding against the Director. On November 30, 1994, the Board affirmed the denial of benefits to Mr. Pennington, finding that Mr. Pennington did not establish that he was totally disabled from a respiratory standpoint (DX 1).<sup>1</sup>

### Second, and Present Claim

On December 20, 2002, Mr. Pennington filed his second and present claim for disability benefits (DX 3). On July 10, 2003, a claims examiner issued a notice indicating that Mr. Pennington would be entitled to benefits if a decision was issued at that time; however, the parties were provided an opportunity to file additional evidence (DX 18). Without any other evidence submitted, on January 12, 2004, the District Director determined that Mr. Pennington was not entitled to benefits because he had not established that he was totally disabled (DX 19). Mr. Pennington appealed the denial decision and timely requested a hearing (DX 20). As a result, the case was referred to the OALJ on April 30, 2004 (DX 21). Pursuant to a Notice of Hearing, dated June 2, 2004 (ALJ I), I conducted a hearing in Knoxville, Tennessee on September 22, 2004, attended by Mr. Pennington, Mr. Collett and Ms. Ball.

### Evidentiary Comment

At the hearing, Ms. Ball noted that DX 15, only contained the first and third pages of a pulmonary report by Dr. Baker.<sup>2</sup> I left the record open for Mr. Collett, to submit a complete copy of the report dated March 29, 2003. Unfortunately, when Mr. Collett sent me a copy of the report in September 2004, the second and fourth pages were still missing. Nevertheless, I am admitting the documents forwarded by Mr. Collett as CX 2. My decision in this case is based on the hearing testimony, DX 1 to DX 21, CX 1, and CX 2.

### ISSUES

1. Whether, in filing a subsequent claim on December 20, 2002, Mr. Pennington has demonstrated that a change has occurred in one of the conditions, or elements, of entitlement, upon which upon which the denial of his prior claim was based in November 1994.
2. If Mr. Pennington establishes a change in one of the applicable conditions of entitlement, whether he is entitled to benefits under the Act.

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<sup>1</sup>The following notations appear in this decision to identify exhibits: DX – Director exhibit; CX – Claimant’s exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

<sup>2</sup>Apparently, when the copy of the medical report was made, only the front sides of the two-sided pages of the medical report were reproduced.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Stipulations of Fact**

At the hearing, the parties stipulated to the following facts: a) Mr. Pennington's length of coal mine employment was at least 13 years; b) Mr. Pennington has coal workers' pneumoconiosis; c) Mrs. Elsie Joy Pennington is a dependent for the purpose of augmenting any benefits that may be payable; and d) Mr. Pennington has post-1969 coal mine employment (TR, pages 7 to 8, 15, 35 and 36).

### **Preliminary Findings**

Born on July 19, 1943, Mr. Pennington married Mrs. Elsie Pennington on January 16, 1965. Mr. Pennington started mining coal in 1967 and continued working in surface mines through 1981. During this period, he operated a front end loader and worked as triple operator which involved heavy labor shoveling spilt coal. For about the next ten years, until he developed back problems, Mr. Pennington was self employed, vulcanizing coal mine beltlines. His job involved "cooking belts together solid - taking a metal splice out of them, and cooking it back together as a solid piece of belt." His work required a lot of heavy lifting, pulling, carrying and pushing. Mr. Pennington repaired the belts both inside and outside of the mines. Though the belts were not in operation during his repair, Mr. Pennington was still exposed to coal dust during the course of his work (DX 3, DX 6, DX 7, DX 10 and TR, pages 17 to 23, and 32 to 35).

Mr. Pennington had breathing problems in 1990 when he stopped working and his problems have continued to worsen since that time. He "smother[s] a lot," sleeps with two to three pillows and uses oxygen and a ventilator at night. He awakes during the night with breathing difficulties. Mr. Pennington also has a productive cough and wheezes. He can walk only 50 yards or climb one flight of stairs before becoming short of breath. He uses inhalers prescribed by Dr. Gavin, who treats him for pulmonary problems. For 35 years, Mr. Pennington smoked cigarettes at the rate of a half pack to a pack of cigarettes per day and he continues to smoke a pack of cigarettes daily (TR, pages 16, 23 to 29).

### **Issue #1 – Change in Applicable Condition of Entitlement**

Any time within one year of a denial or award of benefits, any party to the proceeding may request a reconsideration based on a change in condition or a mistake of fact made during the determination of the claim; 20 C.F.R. § 725.309 (c) and 20 C.F.R. § 725.310. However, after the expiration of one year, the submission of additional material or another claim is considered a subsequent claim, which will be considered under the provisions of 20 C.F.R. § 725.309 (d). That subsequent claim will be denied unless the claimant can demonstrate that at least one of the conditions of entitlement upon which the prior claim was denied (applicable condition of entitlement) has changed and is now present. If a claimant does demonstrate a change in one of the applicable conditions of entitlement, then generally findings made in the prior claim(s) are not binding on the parties 20 C.F.R. § 725.309 (d) (4). Consequently, the relevant inquiry in a subsequent claim is whether evidence developed since the prior adjudication would now support a finding of a previously denied condition of entitlement.

The court in *Peabody Coal Company v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997) put the concept in clearer terms:

The key point is that the claimant cannot simply bring in new evidence that addresses his condition at the time of the earlier denial. His theory of recovery on the new claim must be consistent with the assumption that the original denial was correct. To prevail on the new claim, therefore, the miner must show that something capable of making a difference has changed since the record closed on the first application.

In adjudicating a subsequent claim by a living miner in which the applicable conditions of entitlement relate to the miner's physical condition, I focus on the four basic conditions, or elements, a claimant must prove by preponderance of the evidence to receive black lung disability benefits under the Act. First, the miner must establish the presence of pneumoconiosis.<sup>3</sup> Second, if a determination has been made that a miner has pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment.<sup>4</sup> Third, the miner has to demonstrate he is totally disabled.<sup>5</sup> And fourth, the miner must prove the total disability is due to pneumoconiosis.<sup>6</sup>

With those four principle conditions of entitlement in mind, the next adjudication step requires the identification of the conditions of entitlement a claimant failed to prove in the prior claim. In that regard, of the four principle conditions of entitlement, the only elements that are capable of changing are whether a miner has pneumoconiosis or whether he is totally disabled. *Lovilia Coal Co. v. Harvey*, 109 F.3d 445 (8th Cir. 1997). That is, the second element of entitlement (pneumoconiosis arising out of coal mine employment) and the fourth element (total disability due to pneumoconiosis) require preliminary findings of the first element (presence of pneumoconiosis) and the third element (total disability).

In Mr. Pennington's case, his most recent, prior claim was finally denied in November 1994 for failure to prove that he is totally disabled from a respiratory standpoint. Consequently, for purposes of adjudicating the present subsequent claim, I will evaluate the evidence developed since the record closed at the hearing during his first claim in December 1992 to determine whether Mr. Pennington can now prove that he is totally disabled.

#### Total Disability

To receive black lung disability benefits under the Act, a claimant must have a total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204 (b) and 718.304. If that presumption does not apply, then according to the provisions

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<sup>3</sup>20 C.F.R. § 718.202.

<sup>4</sup>20 C.F.R. § 718.203 (a).

<sup>5</sup>20 C.F.R. § 718.204 (b).

<sup>6</sup>20 C.F.R. § 718.204 (a).

of 20 C.F.R. §§718.204 (b) (1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by four methods: (i) pulmonary function tests; (ii) arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills.

While evaluating evidence regarding total disability, an administrative law judge must be cognizant of the fact that the total disability must be respiratory or pulmonary in nature. In *Beatty v. Danri Corp. & Triangle Enterprises and Dir.*, OWCP, 49 F.3d 993 (3d Cir. 1995), the court stated, in order to establish total disability due to pneumoconiosis, a miner must first prove that he suffers from a respiratory impairment that is totally disabling separate and apart from other non-respiratory conditions.

Mr. Pennington has not presented evidence of cor pulmonale with right-sided congestive heart failure and the record contains no evidence of complicated pneumoconiosis. As a result, Mr. Pennington must demonstrate total respiratory or pulmonary disability through pulmonary function tests, arterial blood-gas tests, or medical opinion.

#### Pulmonary Function Tests

Exhibit	Date / Doctor	Age / Height	FEV <sup>1</sup> pre <sup>7</sup> post <sup>8</sup>	FVC pre post	MVV pre post	% FEV <sup>1</sup> / FVC pre post	Qualified <sup>9</sup> pre Post	Comments
DX 15	March 29, 2003 Dr. G. R. Baker	59 69.25"	3.16	3.99	79	79.2%	No <sup>10</sup>	Normal
DX 14	May 1, 2003 Dr. V. Simpao	59 70"	2.80	3.37	54	83.1%	No <sup>11</sup>	Mild degree of restrictive airways disease

Neither of the pulmonary function tests produced results that qualify as totally disabling under the regulations. As a result, Mr. Pennington is not able to establish that he is totally disabled through pulmonary function tests under 20 C.F.R. § 718.204 (b) (2) (i).

<sup>7</sup>Test result before administration of a bronchodilator.

<sup>8</sup>Test result following administration of a bronchodilator.

<sup>9</sup>Under 20 C.F.R. § 718.204 (b) (2) (i), to qualify for total disability based on pulmonary function tests, for a miner's age and height, the FEV1 must be equal to or less than the value in Appendix B, Table B1 of 20 C.F.R. § 718, **and either** the FVC has to be equal or less than the value in Table B3, or the MVV has to be equal **or** less than the value in Table B5, or the ratio FEV1/FVC has to be equal to or less than 55%.

<sup>10</sup>The qualifying FEV1 number is 1.98 for age 59 and 68.9"; the corresponding qualifying FVC and MVV values are 2.52 and 79, respectively.

<sup>11</sup>The qualifying FEV1 number is 2.04 for age 59 and 69.7"; the corresponding qualifying FVC and MVV values are 2.60 and 82, respectively.

### Arterial Blood Gas Studies

Exhibit	Date / Doctor	pCO <sup>2</sup> (rest) pCO <sup>2</sup> (exercise)	pO <sup>2</sup> (rest) pO <sup>2</sup> (exercise)	Qualified <sup>12</sup>	Comments
DX 15	March 29, 2003 Dr. Baker	40	69	No <sup>13</sup>	Mild resting arterial hypoxemia <sup>14</sup>
DX 14	May 1, 2003 Dr. V. Simpao	46.0	65.4	No	Ventilatory perfusion mismatch with mild hypoxia

Since none of the arterial blood gas studies satisfy the regulatory total disability criteria, Mr. Pennington cannot establish that he is totally disabled under the provisions of 20 C.F.R. § 718.204 (b) (2) (ii).

### Medical Opinion

Total disability may also be established under 20 C.F.R. § 718.204 (b) (2) (iv) through the preponderance of the more probative medical opinion. Under this regulatory provision, total disability may be found through reasoned medical opinion:

if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b) (1) of this section.

Twenty C.F.R. § 718.204 (b) (1) defines such employment as either his usual coal mine work or other gainful employment requiring comparable skills. To evaluate total disability under these provisions, an administrative law judge must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of his respiratory impairment. *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993).

Based on Mr. Pennington's testimony, I find that during his last coal mine employment, he worked as a belt repairman. His work involved heavy lifting because he was required to lift and carry several heavy items, some weighing as much as 250 pounds. Accordingly, I find Mr. Pennington's last job as a coal miner required the ability to engage in heavy manual labor.

Having established the physical requirements of Mr. Pennington's last coal mining job, I turn to the medical opinions on whether he is capable of returning to work as a coal miner.

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<sup>12</sup>To qualify for Federal Black Lung Disability benefits at a coal miner's given pCO<sup>2</sup> level, the value of the coal miner's pO<sup>2</sup> must be equal to or less than corresponding pO<sup>2</sup> value listed in the Blood Gas Tables in Appendix C for 20 C.F.R. § 718.

<sup>13</sup>For the pCO<sup>2</sup> of 40 to 49, the qualifying pO<sup>2</sup> is 60, or less.

<sup>14</sup>Due to a bad back, Mr. Pennington was not able to perform the exercise blood gas study.

Dr. Glen R. Baker  
(DX 15 and CX 2)

On March 29, 2003, Dr. Baker, board certified in internal medicine and pulmonary diseases, conducted a pulmonary evaluation of Mr. Pennington. Dr. Baker noted Mr. Pennington's 24 year of history of working on the surface coal mines as an equipment and tippie operator. The chest x-ray was positive for pneumoconiosis. The pulmonary function test was within normal limits and the arterial blood gas study did not reach the total disability threshold.<sup>15</sup> Dr. Baker diagnosed Mr. Pennington with an occupational lung disease caused by coal mine employment based on an abnormal x-ray and coal dust exposure. Dr. Baker also opined that Mr. Pennington did not have a pulmonary impairment; he retained the capacity to perform the work of a coal miner.

Dr. Valentino M. Simpao  
(DX 14 and CX 1)

On May 1, 2003, Dr. Simpao, board certified in internal medicine and pulmonary diseases, conducted a Department of Labor sponsored pulmonary evaluation of Mr. Pennington. Dr. Simpao reported that Mr. Pennington worked at the surface of the coal mines between 1967 and 1981, as an equipment and tippie operator. Mr. Pennington's medical history included a heart attack and diabetes. Mr. Pennington has smoked a pack of cigarettes per day since 1983 and still smoked at the time of the examination. Mr. Pennington complained of sputum, wheezing, dyspnea at rest and with exertion, and a cough. He is unable to walk 100 feet or climb five steps without becoming short of breath.

Upon physical examination, Dr. Simpao heard inspiratory and expiratory wheezes. The chest x-ray was positive for pneumoconiosis. The pulmonary function test indicated the presence of a mild restrictive breathing defect. The arterial blood gas study showed mild hypoxemia. Based on the radiographic evidence, Dr. Simpao diagnosed coal workers' pneumoconiosis. Dr. Simpao also opined that Mr. Pennington has a moderate pulmonary impairment related to his pneumoconiosis and that he does not retain the pulmonary capacity to perform the work of a coal miner. The physician based his conclusion on the positive chest x-ray, EKG (electrocardiograph), arterial blood gas, which showed mild hypoxia, the pulmonary function tests, which revealed a mild restrictive airways disease, physical examination of the chest and Mr. Pennington's symptoms. According to Dr. Simpao, "multiple years of coal dust exposure is medically significant in his pulmonary impairment."

Discussion

Based on his pulmonary examination, Dr. Simpao believed Mr. Pennington had a moderate respiratory impairment, which precluded his return to coal mine employment. On the contrary, Dr. Baker opined that Mr. Pennington does not have a pulmonary impairment and retains the capacity to perform his previous coal mine employment. In light of this medical dispute, I must assess the respective probative value of each medical opinion.

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<sup>15</sup>Due to the incomplete copy of Dr. Baker's report, I am unable to determine whether the physician was aware of Mr. Pennington's cigarette smoking history.

To determine the respective and relative probative value of a physician's opinion, I must assess the opinion in terms of documentation and reasoning. As to the first factor, a physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation such as radiographic tests and physical examinations. *Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985). In other words, a doctor who considers an array of medical documentation that is both long (involving comprehensive testing) and deep (includes both the most recent medical information and past medical tests) is in a better position to present a more probative assessment than the physician who bases a diagnosis on a test or two and one encounter.

The second factor affecting relative probative value, reasoning, involves an evaluation of the connections a physician makes based on the documentation before him or her. A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Additionally, to be considered well reasoned, the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

In terms of documentation, both physicians relied on complete pulmonary evaluations which produced nearly similar test results. However, in the area of reasoning, I give greater probative weight to Dr. Simpao's disability determination. Dr. Baker's opinion suffers a significant reasoning shortfall because he did not provide any explanation for his conclusion. The absence of any comment is significant because the arterial blood gas study he conducted identified a deficiency, albeit mild, in Mr. Pennington's ability to fully oxygenate his blood which might reasonably affect his capacity for heavy manual labor, which I have determined was the nature of his work.

In contrast, while not much more eloquent, Dr. Simpao nevertheless specifically referenced the pulmonary restriction identified by the pulmonary function test, the resting hypoxia disclosed by the arterial blood gas study, the physical examination findings of respiratory wheezing, and Mr. Pennington's noted symptoms as the basis for his disability finding. In other words, while the individual test and examination results may not support a finding of total disability, Dr. Simpao presented a probative opinion that the combination was sufficient to diagnosis a total pulmonary impairment.

I note that although Dr. Simpao apparently only addressed Mr. Pennington's ability to return to his work as an equipment/tipple operator as indicated on the employment history form, that employment required heavy manual labor. Since I have determined that Mr. Pennington's subsequent work as a coal belt repairman also involved heavy manual labor, I believe Dr. Simpao's disability assessment that Mr. Pennington is unable to return that level of physical effort sufficiently supports a finding that Mr. Pennington is totally disabled in terms of returning to his last job as a coal miner. Accordingly, through Dr. Simpao's more probative medical opinion, Mr. Pennington has established total disability 20 C.F.R. § 718.204 (b) (2) (iv).



By proving total disability under 20 C.F.R. § 718.204 (b) (2) (iv), Mr. Pennington has also established one of the conditions of entitlement that he previously failed to prove (total disability) has changed and is now present. As a result, under 20 C.F.R. § 725.309, I must now examine the entire medical record to determine whether Mr. Pennington is entitled to benefits under the Act.

## **Issue # 2 – Entitlement to Benefits**

As previously discussed, to receive benefits under the Act, Mr. Pennington must prove that he has a) pneumoconiosis b) that arose out of his coal mine employment and that he is c) totally disabled d) due to coal workers' pneumoconiosis.

Based on the parties' stipulations of fact that Mr. Pennington has coal workers' pneumoconiosis, I find that Mr. Pennington has pneumoconiosis that arose out of his coal mine employment. And, while I have considered the entire record, including the medical evidence in his first claim showing no respiratory disability, Dr. Simpao's more recent and probative medical opinion establishes a total respiratory impairment.

### Total Disability Due to Coal Workers' Pneumoconiosis

Because Mr. Pennington has established three of the four requisite elements for entitlement to benefits, the award of benefits rests on the determination of whether his respiratory disability is due to coal workers' pneumoconiosis. Proof that a claimant has a totally disabling pulmonary disease does not by itself establish the impairment is due to pneumoconiosis. Under 20 C.F.R. § 718.204 (c) (1), absent regulatory presumptions in favor of a claimant,<sup>16</sup> the claimant must demonstrate that pneumoconiosis was a substantially contributing cause of his total disability by showing the disease: a) had a material, adverse effect on his respiratory or pulmonary condition; or, b) materially worsened a totally disabling respiratory impairment caused by a disease or exposure unrelated to pneumoconiosis. Additionally, 20 C.F.R. § 718.204 (c) (2) mandates that "the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report."

Dr. Simpao is the only physician to discuss the etiology of Mr. Pennington's pulmonary impairment. According to Dr. Simpao, Mr. Pennington's exposure to coal dust was "medically significant" in the development of his respiratory disability. Although Dr. Simpao failed to also address the role Mr. Pennington's long, and continuing, history of cigarette use may have had on his development of a restrictive impairment and hypoxia, I believe his opinion is minimally sufficient to prove total disability due to coal workers' pneumoconiosis. The causes of a pulmonary impairment are not mutually exclusive and the regulation does not require that coal dust be the sole cause of the impairment. Instead, coal dust must be a material contributing

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<sup>16</sup>20 C.F.R. § 718.305 (if complicated pneumoconiosis is present, then there is an irrebuttable presumption the claimant is totally disabled due to pneumoconiosis); 20 C.F.R. § 718.305 (for claims filed before January 1, 1982, if the miner has fifteen years or more of coal mine employment, there is a rebuttable presumption that total disability is due to pneumoconiosis); and, 20 C.F.R. § 718.306 (a presumption exists when a survivor files a claim prior to June 30, 1982).

factor. Dr. Simpao's opinion establishes that requisite link. Consequently, Mr. Pennington has proven the final element of entitlement under 20 C.F.R. § 718.204 (c).

### **Augmentation**

Benefits under the Act may be augmented for a person who meets the criteria of spouse under 20 C.F.R. § 725.204 and the dependency requirements of 20 C.F.R. § 725.205. Based on the parties stipulation of fact, I find that Mrs. Elsie Joy Pennington is a qualified spouse and meets the regulatory requirements for spousal augmentation of Mr. Pennington's black lung disability benefits.

### **Date of Entitlement**

Under 20 C.F.R. § 725.503 (b) in the case of a coal miner who is totally disabled due to pneumoconiosis, benefits are payable from the month of onset of total disability. When the evidence does not establish when the onset of total disability occurred, then benefits are payable starting the month the claim was filed. The BRB has placed the burden on the miner to demonstrate the onset of total disability. *Johnson v. Director, OWCP*, 1 B.L.R. 1-600 (1978). Placing that burden on the claimant makes sense, especially if the miner believes his total disability arose prior to the date he filed his claim. In that case, failure to prove a date of onset earlier than the date of the claim means the claimant receives benefits only from the date the claim was filed. The BRB also stated in *Johnson*, "[c]learly the date of filing is the preferred date of onset unless evidence to the contrary is presented."

At the same time, a miner may not receive benefits for the period of time after the claim filing date during which he was not totally disabled. *Lykins v. Director, OWCP*, 12 B.L.R. 1-181, 1-183 (1989). This principle may come into play if evidence indicates there was a period of time after the filing of the claim during which the miner was not totally disabled. One example is the situation in *Rochester and Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600 (3d Cir. 1989) where after the miner filed his claim, the initial probative medical opinions provided some evidence that the miner was not totally disabled, yet the administrative law judge found a subsequent evaluation did establish total disability and then set the entitlement date as the date of the claim. The appellate court affirmed the finding of total disability but believed the administrative law judge erred by awarding benefits from the date of the claim because he had not considered whether the earlier medical evaluations indicated that the pneumoconiosis had not yet progressed to a totally disabling stage. In other words, if evidence shows an identifiable period of time where a miner was not totally disabled by pneumoconiosis that is subsequent to the date the miner filed his claim and prior to a firm medical determination of total disability, then it is inappropriate to award benefits from the month the claim was filed.

However, if no intervening medical evidence raises the possibility of total disability not being present between the claim filing date and the first medical evaluation establishing total disability, then a different set of principles is applicable. In this situation, when the first medical examination after the claim is filed leads to a finding of total disability, the date of the examination does not necessarily establish the month of onset of total disability. Instead, it only indicates that some time prior to the exam, the miner became totally disabled. *See Tobrey v.*

*Director, OWCP*, 7 B.L.R. 1-407, 1-409 (1985) (the date the claimant is “first able to muster evidence of total disability is not necessarily the date of onset”).

Finally, according to 20 C.F.R. § 725.309 (d) (5), when a subsequent claim is approved, “no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.”

In Mr. Pennington’s case, the Benefit Review Board denied his first claim on November 30, 1994. From that time until Mr. Pennington filed his second claim in December 2002, no medical evidence supports a finding of total disability. While I have considered that Dr. Baker did not find total disability in March 2003, I have also determined Dr. Simpao’s nearly contemporaneous assessment in May 2003 was more probative and establishes total disability. Thus, since there is no probative showing Mr. Pennington was not totally disabled in the few months between the claim filing date and Dr. Simpao’s medical examination, his black lung disability benefits are payable beginning December 1, 2002.

### **CONCLUSION**

Through Dr. Simpao’s probative medical opinion, Mr. Pennington has established that he is totally disabled - an element of entitlement previously adjudicated against him. Upon consideration of the entire record, and based on the parties’ stipulations of fact and Dr. Simpao’s assessment, Mr. Pennington has proven that he is totally disabled due to coal workers’ pneumoconiosis. In accordance with 20 C.F.R. § 725.503 (d), the date of entitlement is December 1, 2002. Mr. Pennington’s benefits will be augmented for his dependent spouse, Mrs. Elsie Joy Pennington.

### **ATTORNEY FEES**

Counsel for the Claimant has thirty days from receipt of this decision to submit an additional application for attorney fees related to this case in accordance with 20 C.F.R. § 725.365 and 725.366. With the application, counsel must attach a document showing service of the fee application upon all parties, including the Claimant. The other parties have fifteen days from receipt of the fee application to file an objection to the request. Absent an approved application, no fee may be charged for representation services associated with the claim.

## **ORDER**

The claim for black lung disability benefits by MR. EVERETT PENNINGTON is **GRANTED**. Benefits shall commence December 1, 2002 augmented for his spouse, Mrs. Elsie Joy Pennington.

**SO ORDERED:**

**A**  
RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: August 3, 2005  
Washington, DC

**NOTICE OF APPEAL RIGHTS:** Pursuant to 20 C.F.R. § 725.481 (2001), any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision is filed with the District Director, Office of Worker's Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN.: Clerk of the Board, Post Office Box 37601, Washington, DC 20013-7601. See 20 C.F.R. § 725.478 (2001) and § 725.479 (2001). A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, DC 20210.